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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, AUGUST 21, 2001

PETITION OF

YIPES TRANSMISSION VIRGINIA, INC.

CASE NO. PUC010146

For Arbitration Pursuant to  
§ 252(b) of the Telecommunications  
Act of 1996 to Establish an  
Interconnection Agreement

PRELIMINARY ORDER

On June 25, 2001, Yipes Transmission Virginia, Inc. ("Yipes"), filed with the State Corporation Commission ("Commission") a Petition for arbitration of unresolved issues in its interconnection negotiations ("Arbitration Petition") with Verizon Virginia Inc. ("Verizon Virginia") pursuant to § 252(b) of the Telecommunications Act of 1996.<sup>1</sup> Yipes requests that the Commission issue an arbitration decision consistent with its position on unresolved issues and order the parties to incorporate such into the interconnection agreement. Yipes further requests that it be allowed to modify its Arbitration Petition and add additional issues that might arise prior to the conclusion of this arbitration.

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<sup>1</sup> Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56, *codified* at 47 U.S.C. § 151 *et seq.* Hereinafter, all citations to the Telecommunications Act of 1996 will be to the ("1996 Act") or the ("Act") as codified in the United States Code.

On July 20, 2001, Verizon Virginia filed its Response to the Arbitration Petition of Yipes and an alternative proposed interconnection agreement with Yipes. Verizon Virginia opposes Yipes' request to be allowed to modify its Arbitration Petition. The Commission reserves judgement on Yipes' request, consistent with our findings below.

Yipes brings its Arbitration Petition pursuant to 47 U.S.C. §§ 251 and 252 and the effective rules implementing these provisions of the Act, issued by the Federal Communications Commission ("FCC") in its Local Competition Order.<sup>2</sup> Yipes also relies upon this Commission's Procedural Rules for Implementing §§ 251 and 252 of the Act (20 VAC 5-400-190).

The Commission has declined to waive sovereign immunity under the Eleventh Amendment to the Constitution of the United States. We have avoided waiver of our immunity and explained our reasons in the Commission's *Order of Dismissal of the Application of AT&T Communications of Virginia, Inc., et al. For Arbitration with Verizon Virginia*, Case No. PUC000282, issued December 20, 2000, ("AT&T Dismissal Order"). We repeat below our holding in the AT&T Dismissal Order in which we declined to exercise jurisdiction.

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<sup>2</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, FCC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) hereinafter the "Local Competition Order."

As stated in our November 22, 2000, Order, until the issue of the Eleventh Amendment immunity from federal appeal under the Act is resolved by the Courts of the United States, we will not act solely under the Act's federally conveyed authority in matters that might arguably implicate a waiver of the Commonwealth's immunity, including the arbitration of rates, terms, and conditions of interconnection agreements between local exchange carriers. (AT&T Dismissal Order, p. 2)

Because the United States Supreme Court is reviewing the issue of a state commission's waiver of sovereign immunity<sup>3</sup> by participating in the Act's arbitration procedure, we will await the Supreme Court's decision before proceeding further to arbitrate under the Act.

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<sup>3</sup> See Mathias v. Worldcom Technologies, Inc., 00878 (Ruling below: Illinois Bell Telephone Company. v. Worldcom Technologies, Inc. (179 F. 3d 566 7th Cir. 1999)). The applicable issues under review include:

Does state commissions' acceptance of Congress's invitation to participate in implementing federal regulatory scheme that provides that state commission determinations are reviewable in federal court constitute waiver of 11th Amendment immunity?  
and

Can official capacity action seeking prospective relief against state public utility settlement for alleged ongoing violations of federal law in performing federal regulatory functions under the 1996 Telecommunications Act be maintained under Ex parte Young doctrine?

Also consolidated on appeal is Verizon Maryland, Inc. v. PSC of Maryland, 00-1531 (Ruling below: Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc. (240 F. 3d 279 (4th Cir. 2001))). The Supreme court will consider the following additional issue:

Does federal court have independent subject matter jurisdiction under 28 U.S.C. § 1331 to determine whether state public utility commissions' action interpreting or enforcing interconnection agreement violates the 1996 Telecommunications Act?

Yipes has not sought arbitration under 20 VAC 5-400-180, "Rules governing the offering of competitive local exchange telephone service", specifically 20 VAC 5-400-180 F 6, which provide for our "arbitration" of contested interconnection matters.<sup>4</sup>

The parties may elect to proceed with arbitration by the FCC under the Act in lieu of this Commission, or the parties may pursue resolution of unresolved issues pursuant to 20 VAC 5-400-180 F 6. If the parties wish to pursue this matter before the Commission, the proceeding before us will be deemed to be requesting our action only under authority of Virginia law and our Rules.

Accordingly, IT IS ORDERED THAT:

(1) Yipes and Verizon Virginia shall, within fifteen (15) days of the date of this Order, advise us in writing whether they wish to pursue arbitration before us consistent with the findings above.

(2) This case is continued for further order of the Commission.

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<sup>4</sup> As discussed in our Order of June 15, 2000, in Case No. PUC990101, Petition of Cavalier Telephone, LLC, for arbitration of interconnection rates, terms, and conditions, and related relief, the Commission has authority under state law to order interconnection between carriers operating within the Commonwealth, and § 56-38 of the Code of Virginia authorizes us, upon request of the parties, "to effect, by mediation, the adjustment of claims, and the settlement of controversies, between public service companies, and their employees and patrons."